APPENDIX

Filed April 15, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359, 92-5438, 92-5439

ROBERT J. COAR

v.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid Trucking Industry - Local 701,
Appellants in Nos. 92-5356 and 92-5438

ROBERT J. COAR

v.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their

Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

Argued March 9, 1993

BEFORE: BECKER, GREENBERG, and WEIS, Circuit Judges

(Filed: April 15, 1993)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. Factual and Procedural Background

Defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudik, as trustees of the Pension Fund of Mid-Jersey Trucking Local 701 (the Pension Fund), and the Pension Fund itself, together called the "Fund Defendants," appeal from the district court's order of June 23, 1992, granting summary judgment to plaintiff Robert J. Coar, a former trustee and a beneficiary of the Pension Fund, in his suit seeking a declaration that the Pension Fund's actions in withholding his vested pension benefits and applying them as a set-off to his liability to the fund violated the anti-alienation provision of the Employee Retirement

Income Security Act of 1974 (ERISA), section 206(d)(1), 29 U.S.C. § 1056(d)(1). Coar cross-appeals from the district court's denial of his motion for an award of attorney's fees. Because we conclude that Coar cannot invoke ERISA's anti-alienation provision to shield his benefits from liability for breach of his duty to the Pension Fund, we will reverse the district court's grant of summary judgment and dismiss his appeal of the district court's order denying attorney's fees as moot.

The undisputed facts are as follows. In 1986, Coar, a former trustee, and current participant, of the Pension Fund was convicted, along with Frank Scotto, his co-trustee, and Kenneth Zauber, the general counsel to the Pension Fund, of engaging in a RICO conspiracy to receive kickbacks in exchange for channeling $20 million from the Pension Fund's assets to Omni Funding Group, a Florida-based mortgage company.[1] See United States v. Zauber, 857 F.2d 137, 140, 149-53 (3d Cir. 1988), cert. denied, 489 U.S. 1066, 109 S.Ct. 1340 (1989). In October 1984, prior to the indictment, the Pension Fund and its trustees had filed a civil case against Coar, his co-conspirators, and certain other defendants, alleging ERISA and RICO violations arising from the Omni investment. On September 13, 1990, the district court in the civil case granted summary judgment on liability to the Pension Fund and the trustees against Coar and certain of the other defendants.

Pursuant to its Findings of Fact and Conclusions

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[1]Coar's conviction was affirmed on appeal, and he served 18 months in prison.

of Law Concerning Damages in the fund's civil case, the district court ultimately entered a final, unappealed judgment against Coar for $25,535,887 for fiduciary duty violations under ERISA sections 409(a) and 502(a)(3), and a judgment for $96,607,661 for RICO violations. The district court explained that the $25,535,887 figure represented the difference between what the Pension Fund recovered on its investment with Omni, or received from settlements in litigation to recover its assets, and what it would have earned "had those monies continued to be invested with the Pension fund's other investment managers." On April 16, 1991, prior to the entry of final judgment against Coar, but after the district court found Coar liable, the Pension Fund advised Coar that it would set off Coar's liability to the Pension Fund against his benefits from the fund, beginning with the May 1991 benefits.[2]

On July 17, 1991, Coar filed this action against the Fund to obtain his benefits relying on section 502(a)(1) of ERISA, 29 U.S.C. §1132(a)(1). Coar claimed that the Pension Fund's withholding of benefits violated the non-forfeiture and anti-alienation provisions of ERISA, sections 203(a) and 206(d)(1), 29 U.S.C. §§ 1053(a) and 1056(d)(1). The Fund Defendants answered and filed a

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[2]We understand from the Fund Defendant's representations at oral argument that this case concerns only the monthly benefits due Coar during his lifetime, because the Fund Defendants take the position that they may not set off their claim against any benefits due Coar's survivors.

counterclaim seeking a declaratory judgment that the Pension Fund's withholding of benefits under sections 409(a) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a)(3), did not violate ERISA's non-forfeiture and anti-alienation provisions. The parties each subsequently moved for summary judgment.

On May 12, 1992, the district court filed an opinion holding that, although the non-forfeiture provision of ERISA did not bar the set-off, the anti-alienation provision forbade an equitable set-off by the Pension Fund of its damages against Coar. See Coar v. Kazimir, 792 F. Supp. 345 (D.N.J. 1992). While the district court recognized that the Supreme Court's holding in Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 110 S.Ct. 680 (1990), expressly left open the issue of whether section 206(d)(1) of ERISA forecloses a pension fund from setting off benefits to a beneficiary who breached a fiduciary duty to the fund, it nevertheless found that Guidry's "reasoning [counseled] a strict application of the anti-alienation provision" precluding a set-off by the Pension Fund in this case. Id. at 351. Accordingly, the district court denied the Fund Defendants' motion for summary judgment and granted summary judgment to Coar. Id. The court also awarded Coar attorney's fees under section 502(g)(1) of ERISA, 29 U.S.C. §1132(g)(1), with the amount to be fixed after an affidavit of services was filed. Id. at n.11.

On May 20, 1992, pursuant to Fed. R. Civ. P. 59, the Fund Defendants moved for reconsideration of the summary judgment decision and the attorney's fees

award.[3] In an order entered June 23, 1992, the district court reaffirmed the summary judgment for Coar but, on reconsideration, denied an award of fees. The district court then entered judgment for Coar on June 23, 1992.

On June 29 and July 8, 1992, the Fund Defendants and Coar respectively filed notices of appeal and cross-appeal from the order of June 23, 1992. Coar filed his cross-appeal notwithstanding his prior filing, on July 2, 1992, of a motion in the district court, pursuant to Rule 59(e), to have the court reconsider its denial of his request for attorney's fees. The district court denied Coar's motion for reconsideration on July 31, 1992. On August 5 and August 11, 1992, the Fund Defendants and Coar respectively filed second notices of appeal and cross-appeal. On August 13, 1992, we consolidated all four appeals.

II. JURISDICTION

We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e) (ERISA) and 28 U.S.C. § 1331. We further note that our appellate jurisdiction over the Fund Defendants' first appeal from the summary judgment was not terminated when Coar served his timely motion pursuant to Fed. R. Civ. P. 59(e), notwith-

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[3]While the Fund Defendants also moved for relief under Fed. R. Civ. P. 60, the court held that its motion should be considered under Rule 59.

standing Fed. R. App. P. 4(a)(4) which provides that "[a] notice of appeal filed before the disposition of [such motion] shall have no effect." In this case, Rule 4(a)(4) does not impair our jurisdiction inasmuch as Coar's Rule 59(e) motion related exclusively to the district court's denial of attorney's fees, and did not concern the merits of the final judgment of the district court. See Buchanan v. Starships, Inc, 485 U.S. 265, 268-69, 108 S.Ct. 1130, 1132 (1988). Furthermore, though Coar's first notice of cross-appeal was ineffective because it was filed while his motion for reconsideration was pending, we nevertheless have jurisdiction over his cross-appeal because he filed a timely second notice of cross-appeal following the district court's denial of his motion for reconsideration.

III. STANDARD OF REVIEW

We exercise plenary review of the order granting summary judgment to Coar and denying it to the Fund Defendants. In most cases an appellate court reversing an order granting summary judgment will not direct the district court to enter judgment in favor of the appellant, because a genuine issue of fact will remain. Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1250 (3d Cir. 1992); First Nat'l Bank v. Lincoln National Life Ins. Co., 824 F.2d 277, 281 (3d Cir. 1987). However, when the appeal concerns only issues of law, and there are no material facts in dispute as in this case, we are free to enter an order directing entry of summary judgment in favor of the appellant. Kreimer, 958 F.2d at 1250; Nazay v. Miller, 949 F.2d 1323, 1328

(3d Cir. 1991); First Nat'l Bank, 824 F.2d at 281.

IV. DISCUSSION

In enacting ERISA, Congress established a comprehensive remedial scheme for the protection of:

> the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans,and by providing for appropriate remedIes, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

Section 409(a) of ERISA, mandates that a person breaching duties to a pension plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). Section 502(a) in turn authorizes the Secretary of Labor and any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section [409]" or to obtain an injunction or "other appropriate equitable relief" to redress a fiduciary violation. 29 U.S.C. § 1132(a).

However, ERISA's anti-alienation provision, section 206(d)(1), requires, "Each pension plan shall provide that benefits provided under the plan may not

be assigned or alienated."[4] 29 U.S.C. § 1056(d)(1). Coar argues that this provision prevents the Pension Fund from setting off his benefits pursuant to section 409(a). Thus, he contends that the issue before us is whether section 409(a) overrides section 206(d)(1).[5]

We start our analysis with the Supreme Court's opinion in Guidry. Guidry, the chief executive officer of a union and the trustee of its pension plans, pled guilty to embezzling funds from the union. The union subsequently brought a civil action in which Guidry was found liable. In formulating a remedy, the district court imposed a constructive trust on Guidry's pension benefits and the court of appeals affirmed, in reliance on section 409(a) of ERISA. The Supreme Court reversed.

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[4]Express exceptions to this provision allow assignment for a "qualified domestic relations order" and "a voluntary and revocable assignment of not to exceed 10 percent of any benefit payment." 29 U.S.C. § 1056(d)(2), (3).

[5]Coar does not dispute that he was a fiduciary who owed a duty to the Pension Fund, nor does he deny that he breached that duty. Furthermore, Coar does not contend that the anti-alienation provision of the Pension Fund plan was broader than required by section 206(d)(1) and he does not seek to uphold the judgment by contending that the district court erred in its holding with regard to the anti-forfeiture provision. Section 203(a) of ERISA, 29 U.S.C. § 1053(a) ("each pension plan shall provide that an employee's right to his normal retirement income is nonforfeitable upon the attainment of normal retirement age . . . ").

The Court stated that because the union and pension plans were distinct legal entities and Guidry was found liable only for his breach of duty to the union, "[w]e need not decide whether the remedial provisions contained in § 409(a) supersede the bar on alienation in § 206(d)(1), since [Guidry] has not been found to have breached any fraudulent duty to the pension plans." 110 S.Ct. at 685 (emphasis in original). Thus, the Court held that "the Court of Appeals erred in invoking § 409(a)'s remedial provisions." 110 S.Ct. at 686. The union, recognizing that section 409(a) could not serve as the basis for the set-off in the absence of a breach of duty owed to the pension plan, instead relied on the remedial provisions of the Labor-Management Reporting and Disclosure Act (LMRDA). Section 501(a) of the LMRDA states that a union's officers "occupy positions of trust in relation to such organization and its members as a group" and therefore have a duty "to hold its money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Section 501(b) creates a private right of action for union members "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). The union argued that this provision authorized the imposition of a constructive trust which supersedes ERISA's prohibition on the alienation of pension benefits. 110 S.Ct. at 686.

In rejecting this argument, the Court stated that "[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general

one . . . .'" 110 S.Ct. at 687 (quoting Morton v. Mancari, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2483 (1974)). The Court therefore did "not believe that congressional intent would be effectuated by reading the LMRDA's general reference to 'other appropriate relief' as overriding an express, specific congressional directive [in ERISA] that pension benefits not be subject to assignment or alienation." Id. Rather, it reconciled the two statutes by holding that "the LMRDA determined what sort of judgment the aggrieved party may obtain," while ERISA's section 206(d)(1) related only to "the narrow question of whether that judgment may be collected through a particular means -- a constructive trust placed on the pension." 110 S.Ct. at 687 (emphasis in original).

The Court also declined to accept the union's position that equitable principles might support the establishment of the constructive trust:

> Nor do we think it appropriate to approve any generalized equitable exception--either for employee malfeasance or for criminal misconduct--to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done to them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Id. at 687.

The Court predicated its holding in this regard on its treatment of section 206(d)(1) as an antigarnishment provision and its view of the constructive trust imposed by the district court as a form of garnishment. Furthermore, the Court thought that an equitable exception would eviscerate the provision for it would be difficult to refuse to recognize other exceptions, as courts almost always would think it equitable to garnish the benefits of a wrongdoer on behalf of an innocent creditor. The Court explained:

> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether

> application of the rule in particular circumstances would be 'especially' inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

110 S.Ct. at 687 (emphasis in original).

The few cases, both before and after Guidry, considering the relationship between section 409(a) and section 206(d)(1) have come to conflicting results. Before Guidry the Court of Appeals for the District of Columbia Circuit held that the rule against alienation was not "immutable" where a plan trustee breached his fiduciary duty to the plan. Crawford v. La Boucherie Bernard Ltd., 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 484 U.S. 943, 108 S.Ct. 328 (1988). In reaching this conclusion, the court turned first to the language in section 409(a), finding it to have given courts "broad authority . . . to fashion remedies redressing any breach and for protecting the interests of participants and beneficiaries." Id. at 119. Crawford also relied on ERISA's legislative history, which indicated that ERISA's remedial provisions were intended to "make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger trust assets." Id. at 120 (citing 120 Cong. Rec. S-15737, Aug. 22, 1974, reprinted in 1974 U.S.C.C.A.N. 4639, 5177, 5186). Having determined from the legislative history that the common law of trusts applied, the court then cited the well-established principle that when a trustee who also is a beneficiary of the trust breaches

his fiduciary duty to the trust, the other beneficiaries can force the trustee to make good his breach from his beneficial interest in the trust. 815 F.2d at 120 (citing Bogert, Trusts & Trustees, § 191 at 484 (2d. ed. 1979); III Scott on Trusts § 257, at 2201 (3d ed. 1967)).

Finally, the Crawford court relied on several cases which had recognized exceptions to section 206(d)(1) based on equitable principles. For example, it noted that the Court of Appeals for the Eleventh Circuit had excepted from section 206(d)(1)'s reach liabilities arising from the employee's criminal conduct towards his employer, see St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985), and that other cases had permitted garnishment of benefits to satisfy family support and community property obligations. See, e.g., AT & T v. Merry, 592 F.2d 118 (2d Cir. 1979); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), aff'd, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3158 (1981).

After Guidry, a district court agreed with Crawford that section 409(a) authorizes a set-off notwithstanding section 206(d)(1). Pension Benefit Guar. Corp. v. Solmsen, 743 F. Supp. 125 (E.D.N.Y. 1990).[6] In Solmsen a trustee/beneficiary was found liable to the fund for failing to forward employee and employer contributions to the plan. In formulating a remedy, the district court ordered a set-off of the trustee's benefits.

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[6]Further post-Guidry support for this result also may be found in New Jersey v. Pulasty, 612 A.2d 952 (N.J. Super. Ct. App. Div. 1992).

In so doing, the court cited Crawford for the proposition that "[t]he remedy of set-off in fiduciary breach cases has been recognized as a narrow exception to the anti-alienation provision." Id. at 129. The court commented further:

> ERISA's legislative history and common sense suggest that set off is permissible. No good reason appears as to why [the plan] should have to pay benefits to a person who has wronged the Plan, and the beneficiaries of it, before he made good the wrong.

Id.

The court also concluded that Guidry did not compel a contrary result given the Supreme Court's express refusal to decide whether a fund could set off from pension payments its claim against a beneficiary. Although the Solmsen court did not discuss the language in Guidry regarding the undesirability of creating an equitable exception to section 409(a), it evidently did not consider that language directed to a circumstance in which the trustee/beneficiary was liable to the fund.

However, unlike the Solmsen court, the United States Court of Appeals for the Fifth Circuit, predicted that "[b]ased upon Guidry's strict application of the anti-alienation provision" the Supreme Court would not find the language in section 409(a) expansive enough to supersede the anti-alienation provision. Herberger v. Shanbaum, 897 F.2d 801, 804 (5th Cir.) cert. denied, 498 U.S. 817, 111 S.Ct. 60 (1990). That court thus declined to follow Crawford as it considered that Guidry had

undermined much of the reasoning in Crawford. Id. In particular, Herberger found Crawford's reliance on ERISA's legislative history no longer to be persuasive, given that Guidry found no justification to create an exception to the anti-alienation provision. Herberger deduced that if the Supreme Court believed that the legislative history warranted an equitable exception to the anti-alienation provision, it would have said as much.

Herberger also observed that the Supreme Court in Guidry rejected holdings in some of the cases relied on by Crawford to support the proposition that the anti-alienation provision is not "immutable." For example, Guidry stated that an employee's criminal misconduct cannot be the basis for a set-off, which is contrary to the holding in St. Paul Fire & Marine, upon which Crawford relied. In addition, Guidry recognized that "qualified domestic relations orders" now are authorized by an express statutory anti-alienation exception. Therefore, in the Herberger court's view, the domestic relations cases cited by Crawford no longer supported the Crawford court's decision to create a judicial exception to the anti-alienation provision. "To the contrary, the fact that Congress amended the statute to allow this exception lends support to the notion that Congress will create exceptions where it sees fit and courts should not do so." 897 F.2d at 804.

In the case before us, the district court agreed with Herberger that Guidry's discussion of the anti-alienation provision essentially had overruled Crawford, suggesting that the provision was indeed immutable.

First, the district court observed that LMRDA section 501(b) ("or other appropriate relief") was similar to ERISA's section 409(a)("and shall be subject to such other equitable or remedial relief as the court may deem appropriate"). 792 F. Supp. at 349. The district court inferred from this similarity that if the Supreme Court did not find LMRDA's language expansive enough to supersede the anti-alienation provision, it would be unlikely to find section 409(a)'s language sufficient either. Second, the district court felt bound by the Supreme Court's declaration that in passing the anti-alienation provision Congress had made a considered and clear decision to safeguard pension rights. In this regard, the district court, closely tracking Herberger, cited the amendment to ERISA excepting certain domestic relations orders from the anti-alienation provision as evidence that Congress will create policy-oriented exceptions where appropriate. The court found its refusal thus far to do so in cases of the type before us leads to a negative inference. Id. at 350. The court, therefore, declared that "despite the natural distaste for permitting a beneficiary who has wronged the pension fund to collect benefits, a legislative policy determination has been made and the statute . . . is clear." Id. at 351.

We decline to follow this reasoning because we think it construes Guidry's holding too broadly and places insufficient emphasis on the wording of sections 409(a) and 206(d)(1) and ERISA's legislative history. This case fundamentally differs from Guidry for here, unlike the Supreme Court in Guidry, we are analyzing

two provisions in the same statute. We therefore are obliged to reconcile these provisions and to apply both without undermining either's purpose for, "In interpreting language in one section of a statute in conjunction with language of other sections, [a] court strives to find a reading that is consistent with the purposes of the entire statute considered as a whole." Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1416 n.15 (9th Cir. 1990).

Nothing in section 206(d)(1) suggests that Congress intended that provision to limit the remedies afforded to beneficiaries under section 409(a) or in any way to protect unscrupulous fiduciaries. Neither does the legislative history of section 206(d)(1), which courts have described as "sparse," Ellis Nat'l Bank v. Irving Trust Co., 786 F.2d 466, 470 (2d Cir. 1986), and inconclusive, General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980), indicate that a dishonest trustee should be shielded from the consequences of a breach of fiduciary duty. On the contrary, the "only available [legislative] history," Northwest Airlines, Inc. v. Roemer, 603 F. Supp. 7, 9 (D. Minn. 1984), states that the objective of the provision was "[t]o further ensure that the employee's accrued benefits are actually available for retirement purposes . . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4734. If, as indicated by the legislative history, the anti-alienation provision is intended "to protect plan beneficiaries by ensuring that plan assets are used only for payment of benefits" we think that Congress's purpose "would be undermined, not advanced, by an

interpretation that prohibited offset under these circumstances," because the Pension Fund's assets would be dissipated further through payments to those who had looted the fund rather than being preserved for the beneficiaries' use. Crawford, 815 F.2d at 122.

We note further that Guidry did not state that section 206(d)(1) is immutable. Rather, the Court's main reason for not overriding the anti-alienation provision through the LMRDA was that the LMRDA's provision was general whereas the anti-alienation provision in ERISA was specific. This reasoning, however, does not support the district court's conclusion in this case, and actually suggests the opposite result, because section 409(a) is more specific than both the anti-alienation provision in ERISA and the LMRDA provision. Section 409(a) expressly states that the trustee who violates a fiduciary duty to the plan must make good to the plan. It therefore imposes a specific obligation upon the trustee to return misappropriated assets to the beneficiaries. Section 409(a) also directs the courts to ensure that the wayward trustee fulfills this obligation to make restitution through whatever remedy the court deems appropriate in the circumstances ("such other equitable or remedial relief as the court might deem appropriate"). In contrast, the anti-alienation provision speaks only in the most general terms.

Consequently, under Guidry's reasoning, the more specific language of section 409(a) serves as a better indicator of congressional intent than the general language of section 206(d)(1). Thus, section 409(a) should "not be controlled or nullified" by the anti-

alienation provision. See also Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co., 322 U.S. 102, 64 S.Ct. 890 (1944) (applying rule that when a specific and general provision conflict, the specific terms and language prevail); Gallenstein v. United States, 975 F.2d 286, 290 (6th Cir. 1992) (holding that when construing a general enactment and a more particular enactment within the same statute, and when the plain language of the two subsections cannot be otherwise reconciled, the more specific subsection should be given effect); Markair, Inc. v. Civil Aeronautics Bd., 744 F.2d 1383, 1385 (9th Cir. 1984) (reciting "the well-settled rule of statutory construction that specific terms of a statute override the general terms").

Therefore, given section 409(a)'s express mandate that trustees undo any harm they have done to the pension plan, and the absence of any language in section 206(d)(1) or its legislative history limiting the range of options granted to the courts under ERISA to see that this is done, we do not believe that Congress intended the anti-alienation provision to dilute the potential relief available to pension beneficiaries. Instead, we read section 206(d)(1) and, by extension Guidry, as shielding only the beneficiaries' interest under the pension plan from third-party creditors.

We also find it significant that the legislative history to section 206(d)(1) speaks of "a garnishment or levy," H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5061, and that Guidry, as we have indicated, refers to section 206(d)(1) as an "anti-garnishment provision." Garnish-

ment connotes a triangular relationship among a debtor, creditor, and third party, in which the creditor levies on some asset owed to the debtor by a third party. See, e.g., Western v. Hodgson, 494 F.2d 379, 382-83 (4th Cir. 1974) (finding that "[u]nder most State statutes, the term 'garnishment' denotes a proceeding whereby a plaintiff seeks to subject to his claim property of the defendant in the hands of a third person, or money owed by a third person to the defendant") (emphasis added); Atwater v. Roudebush, 452 F. Supp. 622, 631 (N.D. Ill. 1976) (distinguishing between set-off and garnishment); Black's Law Dictionary 680 (6th ed. 1990) (defining garnishment as "[a] proceeding whereby a plaintiff creditor, i.e., garnishor seeks to subject to his or her claim the property or money of a third party, i.e., garnishee, owed by such party to defendant debtor, i.e., principal defendant"); 7 C.J.S. Attachment § 2 (1980) ("Generally speaking, garnishment is but a form of attachment .... However, attachment and garnishment differ in character in that attachment is directed against property of the principal defendant which is his possession or under his control, while the object of garnishment is to reach an indebtedness due to the principal defendant by a third person, or property in the possession or control of a third person, which belongs to the principal defendant.") (emphasis added)).[7]

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[7]Contrary to Coar's argument, Patterson v. Shumate, 112 S.Ct. 2242 (1992), does not suggest an opposite interpretation of Guidry. It is true that the Court in

(continued...)

Courts therefore usually would not understand "garnishment" as meaning a set-off of a trustee's benefits by a pension plan itself. For this reason, we believe that Congress and the Supreme Court intended that the term "garnishment" have its usual meaning as an action taken against an asset by a third-party creditor, and not as an action taken by a creditor itself to set off its own

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[7](...continued)
Patterson stated that "this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to" section 206(d)(1). 112 S.Ct. at 2247 (citing to Guidry). Further, the Court also declared, "We have previously declined to recognize any exceptions to ERISA's anti-alienation provision outside the bankruptcy context." Id. at 2250 (citing to Guidry)(emphasis in original). But, again as with Guidry, Patterson did not deal with a trustee who breached a fiduciary duty to the pension fund. Instead, it concerned a claim by a bankruptcy trustee who sought to have the debtor's pension benefits paid to the estate rather than to the debtor himself. Section 541(c)(2) of the Bankruptcy Code provides that a restriction on the transfer of a beneficial interest of a debtor in a trust enforceable under nonbankruptcy law is enforceable in a bankruptcy proceeding. 11 U.S.C. § 541(c)(2). The bankruptcy trustee argued that "non-bankruptcy law" only referred to state law and not to trusts governed by ERISA. The Court disagreed and further held that the anti-alienation provisions of section 206(d)(1) of ERISA satisfied the literal terms of section 541(c)(2) of the Bankruptcy Code. Thus, the debtor's interest in the ERISA plan was excluded from the estate.

obligation against a debt due it. This construction is supported by AT & T v. Merry, 592 F.2d at 124, which indicated that the purpose of section 206(d)(1) "is to protect an employee from his own financial imprudence in dealings with third parties."

The controlling "anti-alienation" regulations issued by the Internal Revenue Service and relied on by Guidry, 110 S.Ct. at 685 n.10 (quoting 26 C.F.R. § 1.401(a)-13(b)(1) (1989)), further clarify this distinction between a set-off of benefits by the plan and a garnishment of benefits by an outsider. The regulations define alienation or garnishment as "[a]ny arrangement providing for the payment to the employer of plan benefits which otherwise would be due to the participant under the plan," or "whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, . . . a plan benefit payment." See 26 C.F.R. § 1.401(a)-13(c)(1) (1992) (emphasis added). Furthermore, they specifically exclude from ERISA's anti-alienation bar actions by the pension plan itself to apply or set off vested pension benefits to recover debts owed by the participant to the plan as a result of a prior overpayment of benefits or as a result of the failure by a participant to repay a debt to the plan. See 26 C.F.R. §§1.401(a)-13(c)(2)(iii) and (d)(2) (1992). Hence, the regulations clearly comprehend "garnishment" or "alienation" as referring to actions by third parties, such as a beneficiary's employer or creditors, and not as recoupment by the pension plan.[8]

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[8]The regulations do treat a voluntary assignment to (continued...)

The fact is that under the construction in the IRS regulations of the anti-alienation provision we are not even concerned with section 409(a), for when the Pension Fund, without Coar's consent, set off the benefits due to him against his debt to it there was simply not an alienation within section 206(d)(1).[9] Indeed, it seems to us that a court would have to stretch section 206(d)(1), which merely requires that the plan provide that benefits "not be assigned or alienated," to encompass a set-off which in the context of this case was nothing more than the Pension Fund's refusal to make payments.

We note also that from a policy point of view our reading of section 206(d)(1), as barring only the alienation of benefits to third parties, is not inconsistent with the Supreme Court's concern in Guidry against creating any equitable exceptions to an "anti-garnishment" rule. If the Supreme Court ruled otherwise, it would have invited all sorts of third-party claims against pension

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[8](...continued)
the plan as security for a loan from the plan as an alienation but we are not concerned with that provision in this case which, of course, deals with an involuntary set-off. 26 C.F.R. § 1.401(a)-13(d)(2) (1992).

[9]It seems to us that if section 206(d)(1) is not applicable, then as a matter of federal common law under ERISA, a concept we discuss below, a court would allow the set-off by following established trust law. As we indicated in footnote 8, supra, we are not concerned with whether a voluntary assignment is an alienation.

funds. Courts would have found it impossible to distinguish the equities of one claim from any other, and ultimately would have rendered the anti-garnishment provision nugatory. No such danger exists here. A holding that section 409(a) trumps the "anti-garnishment" rule in this case, which as we have explained is not even necessary to sustain the Fund Defendants' position, would create only one narrowly defined class of excepted claimants--namely, the fund and thus effectively the beneficiaries themselves, the very persons ERISA was designed to protect.[10] Such a holding certainly would not "approve any generalized equitable exception" to section 206(d)(1). Guidry, 110 S.Ct. at 687.

The legislative history discounted by Herberger also leads us to read Guidry as we do. The Herberger court stated that Guidry undermined the notion that the legislative history of ERISA supports the application of trust law to authorize a set-off through section 409(a).

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[10]The parties understandably do not focus on the distinction between the amounts Coar owes under the ERISA and RICO judgments. Neither will we because the description given by Coar of his limited assets and income convinces us that it would be unrealistic to anticipate that he ever will pay the $25,535,887 ERISA judgment. We acknowledge, however, that there might in theory be a distinction between the judgments to the extent that the set-off is justified by section 409(a). Of course, if the action of the fund in setting off Coar's benefits against his debt was not an alienation, then there would not even be a theoretical distinction between the two aspects of the judgment.

Yet, Guidry did nothing of the sort. Because Guidry did not concern a breach of duty to a trust, the Supreme Court had no reason to consider the traditional principle that a beneficiary and trustee who breaches a fiduciary duty to the trust may forfeit his or her benefits, and did not even mention the legislative history cited by Crawford. Moreover, the Supreme Court previously has read the legislative history of ERISA as requiring the application of traditional trust law in the administration of the statute, see Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110, 109 S.Ct. 948, 954 (1989), and has anticipated that "a federal common law of rights and obligations under ERISA-regulated plans would develop." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 107 S.Ct. 1549, 1559 (1987). Accord Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66, 107 S.Ct. 1542, 1547-48 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26, 103 S.Ct. 2841, 2854 n.26 (1983). Therefore, the legislative history relied on by Crawford continues to have relevance on the issue of whether section 409(a) authorizes a set-off of the benefits of a trustee who is liable to the fund.

In this regard, the Report of the Senate Committee on Labor and Public Welfare states:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . The intent of the committee is to provide the full range of legal and equitable remedies available

in both state and federal courts.

S. Rep. No. 93-127, 93d Cong., 1st Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4838, 4871 (emphasis added).

Similarly, Senator Harrison A. Williams expressly stated that the congressional intent was for ERISA to codify the principles of traditional trust law:

> The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets, and to provide effective remedies for breaches of trust.

120 Cong. Rec. S-15737, Aug. 22, 1974, reprinted in 1974 U.S.C.C.A.N. 5177, 5186 (emphasis added).

Thus, permitting the set-off in this case would effectuate Congress's intent, by making available to the Pension Fund a common law remedy utilized in pre-ERISA days by state and federal courts for breaches of trust. See, e.g., In re Watson, 449 N.E.2d 1156 (Ind. Ct. App. 1983) (holding that successor trustee properly applied former trustee's undistributed income to satisfy prior judgment for improper distribution of trust corpus); In re Van Nostrand's Will, 29 N.Y.S.2d 857, 865 (N.Y. Sur. Ct. 1941) (placing equitable lien upon the beneficial interest of a trustee/beneficiary who had embezzled trust property to compensate wronged beneficiaries of the trust); In re Burr's Estate, 257 N.Y.S. 654 (N.Y. Sur. Ct. 1932) (holding that a trustee properly withheld trust payments owed to a prior trustee who had misappropriated trust funds), aff'd, 263 N.Y.S. 945

(N.Y. App. Div. 1933);[11] Restatement (Second) of Trusts § 257 (1959) ("If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust, unless the settlor manifested a different intention.").

Considering that Congress stated that it wanted pre-ERISA trust law applied to ERISA's remedial provisions; that this pre-ERISA law provides for a set-off in the circumstances of our case; and that the remedial provision at issue, section 409(a), expressly requires the trustee breaching his or her fiduciary duty to make good to the plan, we believe that Congress did not intend to allow an individual such as Coar to collect pension benefits prior to satisfying his liabilities to the fund. Indeed, a contrary reading would permit dishonest trustees, such as Coar, "who repeatedly and indeed blatantly breached their fiduciary duties to the pension plan" to evade their obligations to the fund and would result in "[p]lan members and their families [having] to watch their pension monies disappear once again into the [dishonest trustees'] pockets." Crawford, 815 F.2d at

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[11]Interestingly, in reaching this conclusion, the Burr court held that a state law similar to section 206(d)(1) of ERISA, precluding the assignment of a beneficiary's interest, did not apply because "[i]t was not intended to protect a dishonest fiduciary in the retention of income otherwise payable to [the beneficiary] from the trust." 257 N.Y.S. at 657.

121.[12] We cannot understand how such a result would protect funds from being "dissipated" or "endangered." See also United States v. Huff, 873 F.2d 709, 713 (3d Cir. 1989) (refusing to construe sentencing guidelines "in a manner which may lead to an absurd consequence"); Government of Virgin Islands v. Berry, 604 F.2d 221, 225 (3d Cir. 1979) ("'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.'"(quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868))).

Thus, construing section 206(d)(1) as limiting the remedies provided to beneficiaries by section 409(a) anomalously would deny beneficiaries of pension funds protection under ERISA that was available under prior law, an interpretation of ERISA which the Supreme Court has disfavored. See Firestone, 489 U.S. at 114, 109 S.Ct. at 956 (rejecting "reading of ERISA" which "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted").

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[12]Coar emphasizes that in our opinion in his criminal appeal we found "no evidence that the government could or did show that the pension fund lost money, either from its corpus or Omni's guaranteed rate of return." United States v. Zauber, 857 F.2d at 144. However, the Pension Fund is not bound by the government's proofs at a criminal trial at which it was not a party. In its action against Coar, the Pension Fund established that it had actual losses under ERISA of $25,585,887.

Therefore permitting the set-off in this case best implements Congress's purpose to guarantee pension beneficiaries the broadest protection possible against fiduciaries who breach their fiduciary duties to a pension fund and thereby cause it losses.[13]

In seeking to avoid this result, Coar suggests that we should construe section 409(a) narrowly as creating only a cause of action without authorizing a method of recovery. In the first place, the language of the provision belies such an interpretation because it speaks of remedies as well as a pensioner's right to bring suit. In fact, the text implies that courts should apply whatever remedies seem equitable under the circumstances of a given case. More importantly, Coar's proffered construction leads only to fruitless question begging. Given this context, because Congress created a right, it probably intended to create a remedy. Thus, accepting Coar's suggested reading of section 409(a) would not solve our problem, but instead would place us in the same

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[13]We recognize that it is possible that a pension fund might in circumstances which arguably are premature set off benefits such as when it claims nothing more than that a trustee made an unwise investment and the trustee disputes that claim. We are, however, not concerned with that type of situation in this case, for the fund did not set off until after it obtained a summary judgment on liability so that it was obvious that Coar would be indebted to it under ERISA. Accordingly, we are not required to determine the earliest point at which a set-off is justifiable because whatever that point may be, it was passed in this case.

situation as at the beginning of our inquiry; namely, forcing us to ask again what remedy does section 409(a) authorize?

Likewise, unlike the district court and Coar, we do not attach significance to the fact that Congress has created some exceptions to section 206(d)(1), such as in the domestic relations context, see section 104(a) of ERISA, 29 U.S.C. § 1056(d) (creating exception to section 206's anti-alienation provision for qualified domestic relations orders), without creating an exception for the situation in this case. To start with, of course, inasmuch as a set-off is not an alienation, then the absence of an exception allowing a set-off to the restraint on alienation is meaningless. Furthermore, we do not find that Congress's failure to pass legislation to create an exception to section 206(d) that would cover this situation to be a persuasive indicator of its intent. The Supreme Court previously has admonished the lower courts not to read Congress's refusal to amend ERISA as necessarily indicative of a particular intent. "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences may be drawn from such inaction.'" Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 110 S.Ct. 2668, 2678 (1990) (quoting United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 1359 (1962)). This is particularly true in our case where, as discussed above, our examination of other available statutory evidence compels the conclusion that Congress would not have intended to forbid a set-off.

V. CONCLUSION

We will reverse the order of June 23, 1992,

appealed at Docket No. 92-5356, and will remand the case to the district court for entry of judgment in favor of the Fund Defendants. We will dismiss the Fund Defendants' second appeal at Docket No. 92-5438 as both unnecessary and untimely. In view of our disposition, Coar's cross-appeals from the district court's denial of attorney's fees are moot, as he makes no contention that he is entitled to fees if the Fund Defendants are successful on the merits. See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 675 (3d Cir. 1991), cert. denied, 112 S.Ct. 1668 (1992); Ingersoll-Rand Financial Corp. v. Anderson, 921 F.2d 497, 504 n.11 (3d Cir. 1990). Furthermore, his first cross-appeal at Docket No. 92-5359 was premature. Thus, we also will dismiss the cross-appeals at Docket Nos. 92-5359 and 92-5439.

BECKER, Circuit Judge, concurring.

I do not agree with the majority that the language of § 409(a) of ERISA, 29 U.S.C. 1109(a), is more specific (and hence serves as a better indication of Congressional intent) than the language of § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1). The issue here is (involuntary) alienation, and in my view the statutory language dealing with alienation in § 206(d)(1) is more specific in that context than the language dealing with equitable remedies under § 409(a). In addition, with respect to

the language concerning a trustee's personal liability to rectify his or her breach of fiduciary liability in § 409(a), I find that language to be as equally general as the anti-alienation provision of § 206(d)(1). In my view, neither § 409(a) nor § 206(d)(1) can be accurately characterized as more specific than the other and therefore warranting greater interpretive authority.

I also do not agree with the majority that the language of § 206(d)(1), and by extension Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 110 S. Ct. 680 (1990), can fairly be read as shielding only the beneficiaries' interest under the pension plan from third-party creditors and not second-party creditors, namely the Fund itself. In my view, the plain meaning of "may not be assigned or alienated" in § 206(a)(1), appears to apply equally to involuntary alienation by the Fund itself and to involuntary alienation initiated by a garnishing third-party. In other words, the plain meaning of § 206(d)(1) seems to encompass both the involuntary alienation arising by reason of Coar's criminal fiduciary breach in the context of a claim by the Fund and a claim by a garnishing third party.

All that said, I nonetheless concur in the judgment. I do so because I recognize that the Supreme Court in Guidry expressly left open the question before us, see 493 U.S. at 373, 110 S. Ct. at 685, and, consistent with the observation of the majority opinion, see Majority Typescript at 18, I cannot conceive that Congress intended that someone in the position of Mr. Coar (in contrast to any of his survivors) should be able to receive pension benefits from the Fund he had so

extensively defrauded (at least until the amount taken was repaid). As Judge Nickerson observed, reaching the same conclusion, in a post-Guidry case, see Pension Benefit Guar. Corp. v. Solmsen, 743 F. Supp. 125 (E.D.N.Y. 1990), such a result would make no sense. See Sutherland, Statutory Construction § 363 (2d ed. 1904) (a statute should not be interpreted to create absurd results); accord Robert Winzinger, Inc. v. Management Recruiters of Bucks County, Inc., 841 F.2d 497, 500 (3d Cir. 1988). This result would be particularly counter-intuitive given that we are interpreting a statute, ERISA, the broad purpose of which is to protect and ensure the availability of pension funds for retirees. As the majority opinion acknowledges, to allow Coar to collect his pension from the very Fund he defrauded would detract from this overriding purpose of ERISA.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359,
92-5438, 92-5439

ROBERT J. COAR
V.
JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pensin Fund-Mid Jersey Trucking Industry Local 701; WILLIAM LEVINE, in hisapacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee as of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid-Jersey Trucking Industry - Local 701,

Appellants in Nos. 92-5356 and 92-5438

ROBERT J. COAR

ROBERT J. COAR

V.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINGSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and WEIS, Circuit Judges

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The Petition for rehearing filed by the appellee-cross appellant Robert J. Coar in the above captioned

matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/

Circuit Judge

Dated: May 11, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359,
92-5438, 92-5439

ROBERT J. COAR
V.
JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pensin Fund-Mid Jersey Trucking Industry Local 701; WILLIAM LEVINE, in his
capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee as of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid-Jersey Trucking Industry - Local 701,

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ROBERT J. COAR

V.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

Present: Becker, Greenberg, and Weis, Circuit Judges

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel March 9, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 3, 1992, be, and the same is hereby appealed at Appeal No. 92-5356 and the

cause is remanded to the District Court for entry of judgment in favor of the Fund Defendants. Appeal No. 92-5438 is dismissed as unnecessary and untimely. The cross-appeals filed by Robert J. coar from the District Court's denial of attorney's fees are moot, as Mr. Coar makes no contention that he is entitled to fees if the Fund Defendants are successful on the merits. In addition, Mr. Coar's first cross-appeal which was docketed at Appeal No. 92-5359 was premature. Both cross appeals which were docketed at appeal Nos. 93-5359 and 92-5439 are dismissed. Costs taxed against Robert J. Coar. All of the above in accordance with the opinion of this Court.

Attest:
Clerk

Dated: April 15, 1993

Certified as a true copy and issued in lieu of
a formal mandate on May 19, 1993.

**Certified as a true copy and issued in lieu
of a formal mandate on May 19, 1993.**

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR,

Plaintiff,

vs.

JOSEPH KAZIMIR, et al.

Defendants.

Civil Action No.
91-3116 (MTB)

OPINION

APPEARANCES:
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By: Roger B. Kaplan, Esq.
Attorneys for Defendant

BEFORE: HON. MARYANNE TRUMP BARRY, U.S.D.J.

I. Introduction

Plaintiff Robert J. Coar has brought this action against defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudik, in their capacities as trustees of the Pension Fund of Mid-Jersey Trucking Local 701 ("the Fund"), and against the Fund itself. Among the relief Coar seeks is a declaration that defendants' actions is withholding his vested pension benefits and applying them as a set-off to his liability to the Fund violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.c. § 1001 *et seq.;* an injunction preventing further withholding of his benefits; and damages equal to the amount of pension benefits heretofore withheld.[1] *See* Amended Complaint ¶18. Defendants have counterclaimed seeking a declaratory judgment that their withholding of Coar's pension benefits because of his breach of fiduciary duty was permitted by ERISA. Answer to Amended Complaint ¶21. Presently before the court are the parties' cross-motions for summary judgment on the issue of whether defendants could withhold Coar's pension benefits and apply them as a set-off to his liability. For the reasons which follow, it is clear that they could not.

II. Factual Background

The facts underlying this action are complex and

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[1]In addition, Coar seeks interest on the benefits withheld from him and all parties seek costs and counsel fees.

need only be summarized briefly here.[2] Coar was one of two lifetime trustees of the Funds. In 1982, he and his co-trustee, Frank Scotto, entered into a contract on behalf of the Fund under which the Fund agreed to transfer $20 million for a period of thirty years to Omni Funding Group ("Omni"), a Florida-based mortage company owned by Joseph Higgens. *Id.*at 140-141. In exchange for directing this investment, Coar and Scotto, along with Fund general counsel Kenneth Zauber, solicited kickbacks form Higgins and his partner in the scheme, David Friedland, former general counsel to the Fund. *Id.* at 153. In 1987, Coar, Scotto, and Zauber were convicted of mail and wire fraud and conspiracy to receive kickbacks in violation of the Racketeering Influenced Corrupt Organizations Act (RICO), 19 U.S.C. § 1962(d). Friedland, also named in the indictment, became a fugitive and, upon his arrest, pleaded guilty. Coar's conviction for conspiracy to receive kickbacks was affirmed on appeal, although his convictions for mail and wire fraud were vacated because the government had not proved that the Fund had suffered a money or property loss. He served 18 months in prison and has since been released.

The actions of Coar and his co-conspirators also gave rise to a civil action when the Fund brought claims including, *inter alia*, a claim for breach of fiduciary duty owed to the Fund in violation of ERISA and civil RICO. *Pension Fund-Mid Jersey Trucking Industry Local 701, et al.*

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[2]For a more detailed factual recitation, *see United States v. Zauber*, 857 F.2d 137 (3rd Cir.1988)(in banc).

v. Omni Funding Group, Inc., No. 84-4332(GEB). On September 13, 1990, the Hon. Garrett E. Brown granted partial summary judgment as to liability only against Coar, Zauber, Friedland, Scotto, Higgins and Omni on, among other things, that court of the complaint alleging breach of fiduciary duty under ERISA. Subsequently, following a damage hearing, Judge Brown entered judgment against those defendants finding them to be jointly and severally liable to the Fund in the aggregate amount of $122,143,548.00. *See* Second Supplemental Affidavit of Roger B. Kaplan (hereinafter "Kaplan Second Suppl. Aff.), Exh. Q and R.[3]

This action arises out of defendants' decision, in April, 1991, to withhold pension benefits which Coar had been receiving since 1982 and apply them as a set-off for the damages for which he was liable to the Fund as the result of his breach of fiduciary duty. *See* Letter dated April 16, 1991 from Frederic Becker to Robert Coar, Affidavit of Roger Kaplan, dated February 27, 1992 (hereinafter "Kaplan Aff.") Exh. I. Defendants' decision came after Coar's liability to the Fund had been established in the civil case, but before there had been a judgment reflecting the monetary loss suffered by the

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[3]Findings of fact and conclusions of law were issued on March 19, 1992. *See* Kaplan Second Suppl. Aff., Exh.Q. Judgement was entered on April 2, 1992. Coar and codefendants Zauber, Friedland, Scotto, Higgins and Omni were found jointly and severally liable to the Fund in the amount of $25,535,887 for ERISA violations and $96,607,661 for RICO violations. *See* Kaplan Second Suppl. Aff., Exh.R.

Fund and, in particular, the loss to the Fund attributable to Coar's breach of fiduciary duty, a fact to which Coar attributes much significance. See n.7, *infra*. It is not disputed that Coar was a fiduciary who owed a duty to the Fund and breached that duty. Neither is it seriously disputed that the fund sustained a loss as a result of the kickback scheme in which Coar was a principal player.[4]

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[4]The parties differ as to whether there is an issue properly before the court concerning the Fund's construction or interpretation and application of the Plan and Trust Agreement. Defendants claim that Coar cannot be heard to challenge the Fund's construction or interpretation of the Plan and Trust Agreement because he has not exhausted is administrative remedies. Coar takes issue with this claim, contending that not only is it proper that arguments be heard with regard to the Fund's construction and interpretation of the Plan and Trust Agreement, but that the inquiry into the basis for defendants' actions must be limited to the facts as set forth in the April 16, 1991 letter from the Fund trustees to Coar informing him that this pension benefits would be applied to his liability to the Fund. *See* Kaplan Aff., Exh. I. Moreover, the parties disagree as to the effect of their March 6, 1992 stipulation, which states somewhat cryptically that

> plaintiff does not and will not dispute that, at the time the defendant trustees of the Pension Fund...made their decision in april 1991 to withhold all further pension benefits from plaintiff, the defendant trustee had before them substantial evidence that, during 1983 and 1984, the

(continued...)

III. Discussion

[1] Defendants claim that they were entitled to withhold Coar's pension benefits by virtue of section 409(a) of ERISA, 29 U.S.C. § 1109(a).[5] Essentially,

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[4](...continued)

> plaintiff...received substantial kickbacks from David Friedland in connection with the $20 million investment by the Pension Fund in 1982 with Omni Funding Group, Inc., and plaintiff does not and will not dispute such evidence in this case.

Stipulation, dated March 6, 1992 (hereinafter "Stipulation") at 1.

These differences may well present issues which could be substantial, both legally and factually. However, because the propriety of alienation or forfeiture of pension fund benefits can be resolved as a matter of law, these issues need not be addressed.

[5]Section 409(a) of ERISA provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciary by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

(continued...)

section 409(a) renders a person who breaches a fiduciary duty to a pension fund personally liable for losses caused by or profits earned from such breach and subjects him or her "to such other equitable or remedial relief as the court may deem appropriate..." 29 U.S.C. § 1109(a). Coar, on the other hand, contends that defendants' action violated both the anti-alienation provision of section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), and ERISA's anti-forfeiture provision, section 203(a), 29 U.S.C. § 1053(a).[6] His primary argument is

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[5](...continued)

> appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 111 of this title.

29 U.S.C. § 1109(a). In addition, defendants cite as a basis for their counterclaim section 502(a)(3) of ERISA, which provides for civil enforcement of the Act's terms:

> A civil action may be brought-
> (3)by a participant, beneficiary, or fiduciary
> (A)to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan...."

29 U.S.C. §1132(a)(3).

[6]Section 206(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan shall (continued...)

that the withholding of pension benefits without a money judgment conclusively establishing a "loss: to the Fund, although couched in terms of a set-off, was effectively a forfeiture. Thus, he contends, the court's analysis of whether his pension benefits were properly or improperly withheld should focus on the anti-forfeiture provision of section 203 of ERISA rather than the statute's anti-alienation provision, although that provision, he claims, was violated as well.[7] Resolution of these competing contentions requires a determination of the nature of the interplay between ERISA's remedial provisions relating to breaches of fiduciary duty and its

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[6](...continued)
provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Section 203(a) provides that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age..." 29 U.S.C. § 1053(a).

[7]Coar makes much of the fact that there had been no adjudication of the amount of loss to the Fund at the time his benefits were withheld. Defendants ague, in response, that a money judgment was unnecessary because substantial evidence of kickbacks was before them at he time they acted and that was all that was required. As will become clear, it is unnecessary to decide whether a money judgment was required prior to defendants doing as they did. In any event, there now is such a judgment and Coar's reliance on the fact that there was none in April 1991 would not take him very far.

anti-alienation and anti-forfeiture provisions.

A. Alienation versus Forfeiture

Coar's attempt to convince this court that the Fund terminated his benefits "as further punishment for the breach of fiduciary duty for which he was convicted criminally," therefore implicating ERISA's anti-forfeiture provision rather than its anti-alienation provision, must fail. Pl. Br. at 17. The March 16, 1991 letter to Coar stated quite clearly that his pension benefits would be withheld "to satisfy [his] liabilities to the Pension Fund for [his] breaches of fiduciary duty...." It is plain at least from the language used by defendants that hey determined to withhold the pension benefits as a set-off against Coar's liability to the Fund and not to permanently deny benefits as punishment for his criminal actions.

Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307,312 (8th Cir.1979), which Coar cites in support of his position, is inapposite. *Winer* involved a forfeiture of pension fund benefits by operation of a "bad boy" clause which provided for the automatic disqualification from benefits of any plan member who had been dishonest with respect to the assets of or in a transaction on behalf of the corporation. The Fund in *Winer* made no claim of set-off vis-a-vis any liability to the Fund; rather, it claimed a forfeiture of the very nature sought to be eradicated by section 203(a) of ERISA, 29 U.S.C. § 1053(a). *See Winer*, 593 F.2d at 311 (citing the legislative history of the anti-forfeiture provision of ERISA). Coar cites no further authority for his invoca-

tion of ERISA's anti-forfeiture provision and, indeed, there appears to be none. Because the intention of defendants in withholding Coar's benefits was clearly to offset his liability to the Fund, and wholly aside from whether such set-off was or was not legally supportable at that time, the relevant section of ERISA in determining the propriety of the Fund's actions must be section 206(d)(1), 29 U.S.C. § 1056(d)(1), the anti-alienation provision.

B. Withholding Pension Benefits to Satisfy a Liability to the Fund for Breach of Fiduciary Duty.

[2] Having determined that defendants' action is appropriately reviewed in light of ERISA's anti-alienation provision, the court must determine whether the remedy of set-off, comprehended within the "such other equitable relief as the court may deem appropriate" language of section 409(a), acts as an exception to the general prohibition against the alienation of such benefits.[8] In their regard, the Supreme Court's opinion in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990) is

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[8]Defendants cite *Carson v. Local 1588, International Longshoremen's Ass'n*, 769 F. Supp. 141 (S.D.N.Y.1991), as support for the proposition that a plan could offset losses by withholding pension benefits upon the beneficiary's breach of fiduciary duty. While that was, in fact, the case in *Carson*, it was only because the non-forfeiture and non-alienation rules do not apply to a top-hat pension, the pension at issue in *Carson* by virtue of the specific exemption found in 29 U.S.C. § 1051(2).

highly instructive.

As an initial matter, it bears mention that *Guidry* expressly left open the matter now before the court. *Id.* at 365,110 S.Ct. at 681. Because the pensioner in that case had breached a fiduciary duty to the union itself rather than to the Fund, the Court found section 409(a) inapplicable and specifically refused to decide whether the remedial provisions of 409(a) supersede the bar on alienation in section 206(d)(1). Resisting the "natural tenency to blur the distinction between a fund and its related union." the Court looked instead to section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 501(b).[9]

There are similarities, however, between section 501(b) of the LMRDA and section 409(a) of ERISA, thus rendering much of *Guidry's* reasoning and analysis apt to the instant matter. *Compare* LMRDA section 501(b),

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[9]Section 501(b) of the LMRDA provides for a private right of action in federal court to recover damages or "other appropriate relief for the benefit of the labor organization" for breaches of fiduciary duty by union officers. 29 U.S.C. §501(b). Having found no significant difference between a writ of garnishment and a constructive trust, *see Guidry*, 493 U.S. at 372, 110 S.Ct. at 685, the Court assumed that "other appropriate relief" may authorize, under certain circumstances, the imposition of a constructive trust. *Id.* at 374, 110 S.Ct. at 686. Nevertheless, the Court was persuaded that the countervailing interest expressed by ERISA's anti-alienation provision prevented the imposition of a constructive trust on pension benefits. *See Guidry*, 493 U.S. at 375, 110 S.Ct. at 687.

29 U.S.C. § 501(b)("or other appropriate relief") with ERISA section 409(a). 29 U.S.C. § 1109(a)("and shall be the subject to such other equitable or remedial relief as the court may deem appropriate"). And, importantly here, the Court's interpretation of section 206(d)(1) is right on point, Thus, *Guidry's* discussion of the prohibition on the assignment or alienation of pension benefits set forth in section 206(d)(1) of ERISA is extremely important for this court's purposes.

The Court noted that section 206(d)(1)is clear and reflects a "considered...decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done to them." *Id.* Thus, the Court continued, courts should generally be loathe to create equitable exceptions to unqualified statutory pronouncements. *Guidry*, 493 U.S. at 376, 110 C. Ct. at 687.

> The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then refuse enforcement whenever enforcement appears inequita-

> ble. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the full in particular circumstances would be "especially" inequitable. The impracticality of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Id. at 376-77, 110 S.Ct. at 687-688 (emphasis in original). The Court recognized that the operation of an antigarnishment provision, like the anti-alienation provision of section 206(d)(1), will almost always seem inequitable. Despite the "natural distaste" for such a result, the Court nevertheless paid deference to the legislative policy decisions behind the anti-alienation provision and left any change in that policy to Congress. *Id.* at 377, 110 S.Ct. at 688.

Guidry, of course, involved reconciling two distinct statutes: the "other appropriate relief" power of the LMRDA and the anti-alienation language of ERISA. Here, the reconciliation must take place within ERISA itself with the court determining whether Congress intended that the remedial aspects of section 409(a) supersede the anti-alienation provision of section 1056(d)(1).

The District of Columbia Circuit, in its opinion in *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C.Cir.), *cert. denied*, 484 U.S. 943, 108 S.Ct.328, 98 L.Ed.2d 355 (1987), answered this question in the

affirmative. In reaching its conclusion, the *Crawford* court noted that ERISA's anti-alienation provision is "not immutable," citing decisions in which the garnishment of pension plan benefits was permitted to satisfy family support and community property obligations of divorce decrees and to satisfy liabilities arising from an employee's criminal misconduct toward his employer. *Crawford*, 815 F.2d at 121 (citing *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118(2d Cir.1979); *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir.1980), *cert. denied sub nom. Seafarers International Union, Pacific District-Pacific Maritime Association Pension Plan v. Stone*, 453 U.S. 922, 101 S.Ct.3158, 69 L.Ed.2d 1004 (1981); and *St. Paul Fire and Marine Insurance Co. v. Cox*, 752 F.2d 550 (11th Cir.1985)).

This conclusion, however, has been vitiated not only by *Guidry* itself, which held that it is not for a court to declare that an employee's criminal misconduct can be the basis for an offset, but by the passage of section 104(a) of the Retirement Equity Act of 1984, 29 U.S.C. § 1056(d)(3), subsequent to the domestic relations decisions relied on by the *Crawford* court. Section 104(a) excepts certain domestic relations orders from the anti-alienation provision, and that Congress chose to do so indicates a willingness to create such policy-oriented exceptions where appropriate. Indeed, the Supreme Court noted this fact in reaching its conclusion in *Guidry* that the equitable enforcement provision of the LMRDA should not override ERISA section 1056(d)(1). *See Guidry*, 493 U.S. at 376 n. 18, 110 S.Ct. at 687 n. 18.

The precedential value of *Crawford* is, at least in

this court's view, questionable in light of the Supreme Court's subsequent decision in *Guidry*. The Fifth Circuit, in *Herberger v. Shanbaum*, 897 F. 2d 801 (5th Cir. 1990), held, as does this court, that section 409(a) cannot override the anti-alienation provision of section 206(d)(1). The court considered *Crawford* in light of *Guidry* and determined that *Guidry* had seriously undermined much of the reasoning of the *Crawford* court. *Herberger*, 897 F.2d at 804. The court noted that the Supreme Court in *Guidry* rejected the notion, suggested in *Crawford*, that a generalized equitable exception to the anti-alienation provision is warranted by virtue of ERISA's legislative history endorsing traditional trust principals. *Id.* Instead, *Herberger* extrapolated that the Supreme Court's strict application of the anti-alienation section would lead the court to reject an exception based on section 203(a).*Id.*

This view, however, is not unanimous. A contrary view was taken by the court in *Pension Benefit Guaranty Corp. v. Solmsen*, 743 F.Supp.125 (E.D.N.Y.1990), which, undaunted by the Supreme Court's analysis in *Guidry*, adopted the reasoning of *Crawford* and permitted a pensioner's benefits to be used as a set-off for his liability for breach of fiduciary duty. The court, recognizing that *Guidry* had left open the question of whether section 409(a) could supersede the anti-alienation provision of ERISA, considered and rejected the reasoning of *Herberger*. *Solmsen*, 743 F.Supp. at 129. In addition to explicitly relying on *Crawford's* analysis, the court opined that "common sense suggest[s] that set-off is permissible."

This reasoning, however, flies in the face of the Supreme Court's teaching in *Guidry:* despite the natural distaste for permitting a beneficiary who has wronged the pension fund to collect benefits while his or her debt remains outstanding, a legislative policy determination has been made and the statute, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), is clear. *Guidry*, 493 U.S. at 365, 110 S.Ct. at 681. Thus, *Solmsen's* comment that"[n]o good reason appears as to why Guaranty Corp. should have to pay benefits to a person who has wronged the Plan, and the beneficiaries of it, before he has made good the wrong" is more appropriately addressed to the legislature rather than the courts seeking to interpret the law as it now stands.[10]

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[10]In their attempt to distinguish *Herberger*, defendants rely on the *Solmsen* court's view of *Herberger* as a case dealing with a set-off remedy as applied to a third party who participated in the fiduciary breach of another rather than someone who himself breached a fiduciary duty. Such reliance is misplaced, for in this regard the *Solmsen* court is simply wrong. While there was a case related to and discussed in *Herberger* which dealt with the same person's (Shaubaum's) participation in the breach of fiduciary duty of another, *see McLaughlin v. Lindermann*, 853 F.2d 1307 (5th Cir.1988), the facts at issue in *Herberger* were not those. in *Herberger*, a pension beneficiary brought suit against the successors to his former employer, Shanbaum, an individual named Carp, and the Lee Optical Pension Plan, who had been the sole shareholders of the employer-corporation, to recover benefits owed to him.

(continued...)

IV. Conclusion

Recognizing that *Guidry* left open the question of whether the remedial provision of ERISA section 409(a), 29 U.S.C. § 1109(a), can serve as an exception to the unqualified statutory language of the anti-alienation provision of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), this court holds that the Supreme Court's reasoning in *Guidry* counsels a strict application of the anti-alienation provision, and that defendants cannot withhold Coar's benefits and apply them as a set-off to his liability to the Fund. To echo the sentiments of the Supreme Court, while this result may be unpalatable, and it is unpalatable in this case, for Coar has hardly bathed himself in glory, it is nevertheless in accordance with the law, and any change must come from Congress rather than from the court.

Coar's motion for summary judgment will,

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[10](...continued)
The pension plan settled with the beneficiary; at a later trial the court awarded plaintiff damages against Shanbaum and Carp, as well as an indemnification judgment against Shanbaum in favor of the pension plan for Shanbaum's *direct breach of his fiduciary duty to the plan*. *Herberger*, 897 F.2d at 802. When this judgment proved uncollectible, the pension plan sought to withhold Shanbaum's pension benefits as a set-off for his liability to the Plan for his direct breach of fiduciary duty. *Id*. Therefore, any distinction defendants suggest based on *Herberger's* consideration of mere participation by a third party in the breach of fiduciary duty of another is wholly illusory.

therefore, be granted and defendants' motion will be denied. Concomitantly, Coar's motion to dismiss the counterclaim will be granted and defendants' motion for judgment on the counterclaim will be denied.[11] Counsel for Coar shall submit an order reflecting this opinion within ten days of its date.

/s/MARYANNE TRUMP BARRY, U.S.D.J.

Dated: May 12, 1992

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[11]It follows inexorably that those benefits wrongfully withheld from Coar are to be paid to him, together with interest at the appropriate rate, and defendants are to do so within thirty days of this date. It follows, as well, that no further benefits are to be withheld as a set-off for liability for the breach of Coar's fiduciary duty to the Fund. Finally, Coar will be awarded reasonable counsel fees and costs. 29 U.S.C. § 1132. In this connection, counsel shall submit the necessary affidavit within twenty days of this date.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR, Plaintiff, vs. **JOSEPH KAZIMIR, et al.** Defendants.	Civil Action No. 91-3116 (MTB) ORDER

This matter having come before the court upon the motion of plaintiff Robert Coar by his attorney, Hayden, Perle and Silber, pursuant to Fed. R. Civ. P. 56, for an order granting summary judgment in favor of plaintiff upon plaintiff's amended complaint, in the presence of Wilentz, Goldman and Spitzer, Esqs. (Roger Kaplan, Esq., appearing), attorneys for defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato D'Santi, and Robert Dukik in their capacities as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701 (collectively "the Trustees"), and said defendant Trustees, having cross-moved for summary judgment upon their counterclaim, and the Court having reviewed the briefs and supporting documents filed in support of the motion and the cross-motion, and for good cause appearing, as set forth in

the decision of the Court, filed May 12, 1992;

IT IS on this 23rd day of June, 1992 hereby

ORDERED:

A. That plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

B. That defendants are permanently enjoined and restrained from withholding, delaying or otherwise limiting the payment of plaintiff's pension benefits on account of his liability to the Fund to plaintiff or any person who may be entitled to receive those benefits;

C. That judgment is entered in favor of plaintiff and against defendants in the amount of $18,061.62 in past benefits together with interest of $475.26 as of June 22, 1992, same to be paid to plaintiff within thirty days of the date of this order;

Costs to plaintiff.

/s/ MARYANNE TRUMP BARRY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR, Plaintiff, vs. **JOSEPH KAZIMIR, et al.** Defendants.	Civil Action No. 91-3116(MTB) ORDER

This matter having come before the court upon the motion of defendants for reconsideration or to alter or amend the court's May 12, 1992 Opinion ("Opinion") in its entirety or for reconsideration or to alter or amend that portion of the Opinion awarding costs and attorney's fees to plaintiff, pursuant to Fed. R. Civ. P. 59 and 60, or, in the alternative, for a stay of the decision and judgment pending exhaustion of all appeals, pursuant to Fed.R.Civ.P.62(c); and the court having considered the submissions of the parties both in support of and in opposition to the motion without oral argument pursuant to Fed. R. Civ. P. 78; and

it being the opinion of the court that Fed. R. Civ. P. 59(e) provided that a party may move to alter or amend a judgment within ten days of the entry of

judgment; [1] and

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[1]Defendants; motion will be treated as one for reconsideration under Rule 59(e) and General Rule 12(I) of the United States District Court of the District of New Jersey. There has, however, been no judgment entered, and the language of Rule 59(e) states that a motion thereunder must be filed "not later than 10 days after entry of the judgment." Courts and commentators have held, and I agree, that this ten day time period is only a maximum time period and that the rule does not require that there be a pre-existing judgment. Jurgens v.McKasy, 905 F. 2d 382,385-86 (Fed. Cir. 1990), cert. denied, 112 S. Ct. 281 (1991); Smith v. Hudson, 600 F.2d 60, 62 (6th Cir.), cert.denied, 444 U.S. 986 (1979); Jetero Constr. Co. v. South Memphis Lumber Co., 531 F.2d 1348,1351 (6th Cir.1976); 9 J. Moore, B. Ward & J Lucas, Moore's Federal Practice ¶ 204.12[4](2d ed.1989); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2812 at 81-82(1973).

As for defendants' invocation of Rule 60, the only possible section under which defendants could seek relief if Rule 60(b)(6), which authorized the court to take action based on "any other reason justifying relief from the operation of the judgement." Defendants' arguments in favor of relief, however, are simply legal arguments. it is well established that Rule 60(b) is not to be a substitute for appeal, Martinez-McBean v. Government of Virgin Islands, 562 F. 2d 908,911 (3rd Cir.1977), but is to be used to grant relief in extraordinary situations. Moolenaar v. Government of Virgin Island, 822 F. 2d 1342, 1346 (3d Cir. 1987). The Third Circuit has held that legal error is not an extraordinary circumstance which would justify the application of Rule 60(b). Martinez-McBean, 562 F. 2d at 912.

it being the opinion of the court that General Rule 12(I) provides that a party may make a motion for reargument when there are "matters or controlling decisions which counsel believes the Court has overlooked;" General Rule 12(I) of the United States District Court for the District of New Jersey; and

the court considering first defendants' motion for reconsideration or reversal of that portion of the Opinion granting summary judgment in favor of plaintiff; and

it being the opinion of the court that its Opinion was by no means based upon an "implicit and explicit assumption that the anti-alienation provision of ERISA...was inflexible and permitted no exceptions absent Congressional action," Def. Br. in Support of Reconsideration at 2, but rather was based upon the court's interpretation of ERISA in light of the applicable case law, including, inter alia, Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)[2]; and

it being the opinions of the court that defendants' citations to judicial and administrative interpretations of ERISA are not binding on the court, and, in light of the

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[2] Defendants argue that the court ignored the fact that Guidry left open the question before the court. Defendants are mistaken. See Opinion at 9 & 15. Moreover, simply because Guidry expressly left open this issue does not mean that Guidry's reasoning is inapplicable here.

precedent cited in its Opinion, the court does not find them persuasive; and

the court considering second defendants' motion for reconsideration or reversal of that portion of the Opinion awarding counsel fees and costs to plaintiff under 29 U.S.C. § 1132; and

it being the opinion of the court that ERISA section 502(g)(1) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party;" 29 U.S.C. § 1132(g)(1); and

it being the opinion of the court that in considering whether to ward attorney's fees and costs, five factors should be considered: (1) the offending party's culpability or bad faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) the deterrent effect of an award of attorney's fees against the offending party; (4) the benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' position; Ursic v. Bethlehem Mines, 719 F. 2d 670,673 (3d Cir.1983); see also Ellison v. Shengano Inc. Pension Board, 956 F. 2d 1268,1273 (3d Cir.1992); Monkelis v. Mobay Chemical, 827 F. 2d 935, 936 (3d Cir. 1987);[3] and

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[3]In support of his argument for counsel fees, plaintiff cites to Amith v. CMTA-IAM Pension Trust, 746 F. 2d 587,589 (9th Cir.1984) and the Ninth Circuit's statement that "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily recover attorneys' fees from the defendant." However, the Third Circuit in its recent opinion in Ellison explicitly

(continued...)

it being the opinion of the court that defendants did not act in bad faith in withholding plaintiff's pension benefits, inasmuch as defendants waited until after partial summary judgment as to liability, albeit no judgment, was rendered against plaintiff in the action before the Hon. Garrett E. Brown and on equitable grounds, as least, to withhold payment was eminently appropriate; and

it being the opinion of the court that, although the court disagrees with defendants' position as to their right as a matter of law to withhold plaintiff's pension benefits under ERISA, defendants' position is supported by some case law, is not totally without merit, and remains an open question in the Third Circuit; and

it being the opinion of the court that, because defendants were acting to preserve the assets of the Fund for the benefit of all it members and did not violate clearly established law at the time, there is no

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[3](...continued)
rejected the "special circumstances" test employed by the Ninth Circuit in Smith. Ellison v. Shenango Inc. Pension Board, 956 F.2d 1268,1275 (3d Cir.1992). In the course of rejecting the "special circumstances" test, the court found that adoption of that test in ERISA cases is not justified by analogy to fee provisions in similar remedial legislation, id, although plaintiff argues that it is. I cannot, however, write on a clean slate, as plaintiff would have me do, when the Third Circuit has rejected a presumption in favor of granting attorney's fees to prevailing parties and requires application of the Ursic factors.

need to deter defendants' conduct; and

it being the opinion of the court that, while plaintiff's action conferred a monetary benefit only on himself, his action may confer a benefit on other members of the Fund in that the Fund now knows that it cannot withhold pension benefits from a member based on that member's breach of fiduciary duty to the Fund; see Grove v. Modified Retirement Plan for Hourly Paid Employees of Johns Manville, Corp. and Subsidiaries, 803 F. 2d 109, 119-20 (3d Cir. 1986), although this factor does not weigh heavily in plaintiff's favor; and

it being the opinion of the court that the fund easily has the capacity to pay an award of attorney's fees and costs; and

it being the opinion of the court that in balancing the five factors set forth in Ursic, the balance comes down in defendants' favor and defendants will not be required to pay attorney's fees and costs in connection with this action;[4]

the court considering third defendants' request for a stay of enforcement of the judgment pending appeal pursuant to Fed.R.Civ.P.62(c); and

it being the opinion of the court that in considering a motion to stay a judgment pending appeal, pursuant to Rule 62(c), the court should consider (1) whether the stay applicant has made a strong showing

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[4]While costs will not be awarded under ERISA, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P.54(s). Costs will be allowed here.

that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies; Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Evans v. Buchanan, 435 F. Supp. 832, 844 (D.Del.1977)("a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an areas where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially"); and

it being the opinion of the court that while defendant may be able to demonstrate that there is a "serious" question of law on appeal, see Evans, 435 F. Supp. at 844, defendant will not be irreparably harmed in the absence of a stay and, in any event, the harm plaintiff would suffer if a stay were issued counsels against the issuance of a stay pending appeal;

IT IS on this 23rd day of June, 1992 hereby

ORDERED that defendants' motion for reconsideration or to alter or amend that portion of the court's May 12, 1992 Opinion granting summary judgment in favor of plaintiff is denied; and it is further

ORDERED that defendants' motion for reconsideration or to alter or amend that portion of the court's May 12, 1992 Opinion awarding attorney's fees and costs to plaintiff is granted and that the portion of the Opinion awarding attorney's fees and costs is hereby vacated; and it is further

ORDERED that defendants' motion for a stay of the judgment pending appeal is denied; and it is further

ORDERED that defendants' motion for a stay of the judgment pending appeal is denied; and it is further

ORDERED that plaintiff's fee application is denied.[5]

/S/_____
MARYANNE TRUMP BARRY
U.S.D.J.

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[5]It is further ordered, pursuant to Fed. R. Civ. P. 60(a) that a clerical error in the court's Opinion be corrected so that the first sentence of footnote 10 of the Opinion reads as follows:

> In their attempt to distinguish Herberger, defendants rely on the Solmsen court's view of Herberger as a case dealing with a set-off remedy as applied to a third party who participated in the fiduciary breach of another rather than someone who himself breached a fiduciary duty.